

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
SEPTEMBER 15, 1995
(AFTERNOON SESSION)

* * * * *

Taken before William F. Wolfe,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas, on
the 15th day of September, A.D. 1995, between
the hours of 1:10 o'clock p.m. and 5:35
o'clock p.m., at the Texas Law Center, 1414
Colorado, Rooms 101 and 102, Austin, Texas
78701.

ORIGINAL

SEPTEMBER 15, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Anne L. Gardner
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
O.C. Hamilton
David B. Jackson
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon. Ann Tyrrell Cochran
Sarah B. Duncan
Michael T. Gallagher
Michael A. Hatchell
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable F. Scott McCown
Harriet E. Miers
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Hon William Corneius
Paul N. Gold
Doris Lange
W. Kenneth Law

SEPTEMBER 15, 1995 - AFTERNOON SESSION

INDEX

<u>Rule</u>	<u>Page(s)</u>
Sanctions Report	
Rule 166d	2304-2370
TRCP 25 (Medical Records of Non-Party)	2374-2410
Task Force Report on Justice Court Rules	2411-2427
Subcommittee Report on Texas Rules of Civil Evidence	2427-2445
TRCP 145	2445-2474
TRCP 4	2474-2475
TRCP 9	2475-2476
TRCP 14c	2476-2478
TRCP 320	2481-2540

1 CHAIRMAN SOULES: Let's get
2 going. Okay. 166d. Joe, you have the floor,
3 or Chuck, you can do this.

4 MR. LATTING: Well, this is --
5 where is old Tommy Jacks?

6 CHAIRMAN SOULES: He's gone.

7 MR. LATTING: All right. Well,
8 this is a modified version of 166d. To tell
9 you the truth, I can't remember what we
10 changed different to be different from the
11 last time we discussed this in this
12 Committee. I know that Saturday a number of
13 us met and went over -- a number of us
14 including Tommy Jacks and me, and we've been
15 on sort of opposite sides of the debate at the
16 beginning of this committee's work.

17 And what I can tell you is that this
18 draft satisfies him and me and everybody that
19 I know of. I don't think there's anybody that
20 I know of that's unhappy with the way we're
21 approaching it here. But that doesn't mean
22 that it's the only way to do it. I'm just
23 saying that Tommy is happy with it and I'm
24 happy with it, and I can't really -- I don't
25 really think of anything much to bring up

1 specifically as I did with the other -- with
2 the other rule, except that we have left
3 hanging out here this issue that Richard has
4 mentioned a number of times, and I don't
5 propose that we put anything about it; that
6 is, about the Nature of Hearing and Evidence
7 and so on, because as Scott Brister says, the
8 way these hearings always happen anyhow is the
9 guy says, "He did this, that and the other."

10 And the other lawyer says, "No, I didn't"
11 or "Yes, I did. But she did this, and here is
12 what you really ought to pay attention to."

13 And then the judge says, "What
14 happened?"

15 So I don't know if we want to get into
16 talking about what kind of hearing we need to
17 have.

18 MR. HERRING: Well, the other
19 thing that we had originally is that Dorsaneo
20 purports to be drafting a generic, all-purpose
21 Hearing and Evidence Rule that will solve all
22 the problems about the rules, and I think we
23 were waiting for that enlightenment to
24 descend, and we're reserving that issue until
25 it happens.

1 MR. LATTING: Well, the light
2 is still a little dim over here. But I'm not
3 suggesting that we put that in. In fact, I'm
4 suggesting that we take that out, that double
5 question mark that we have there.

6 I think that the way this rule is laid
7 out it seems to be pretty good to me; that is,
8 the organization of it. We've got the
9 procedure. You have a motion. You have a
10 hearing, which we -- and I think we made some
11 slight change to the wording of that, Alex, if
12 I'm not mistaken. An oral hearing is required
13 for motions requesting relief unless waived by
14 those involved. We chose that language
15 because there may be somebody who is not
16 really a movant or a respondent but who may be
17 in some way involved, and we wanted to
18 preserve the notion that there was an actual
19 oral hearing you were entitled to and not just
20 some action by the judge.

21 We separate out -- in paragraph 2 we
22 separated "Expenses for Compelling, Limiting,
23 or Denying Discovery" from no. 3, "Sanctions."
24 And that's where the real meat of the rule
25 is. And what we've tried to do, I think it's

1 fair to say, is that this rule provides that
2 you can get limiting expenses with limiting,
3 compelling or denying discovery, but you can't
4 get sanctions unless you find some extra bad
5 stuff that occurred. We have preserved the
6 language that we've been through many, many
7 times and debated, sort of the -- I'm going to
8 call it the Stephen Yelenosky phraseology,
9 that unreasonably burdensome, and I propose we
10 not talk about that any more because we've
11 discussed that for hours, I think.

12 We get down to "Sanctionable conduct,"
13 and there was one -- I'm not sure whether we
14 discussed this in here or not, but we start
15 off by saying in 3(a)(i) that a person subject
16 to a discovery order, other than a Discovery
17 Control Plan under Rule 1, and the reason for
18 that is that the feeling of the members of the
19 committee, the subcommittee, was that these
20 Discovery Control Plans, if you violate one of
21 them, that shouldn't form the basis of
22 sanctionable conduct, which I think is kind of
23 ironic since I'm against them plans anyway
24 under Rule 1.

25 But it seems like to me that if we're

1 going to have them, they ought to be
2 enforceable, but the committee didn't feel
3 like that you ought to be able to get
4 sanctions for violating one of these rules we
5 just provided for under discovery.

6 But the real meat of this rule is at the
7 top of the next page. This is the part that
8 we spent two or three days at two or three
9 different times talking about, and this is
10 what it's come down to under the A, B, C, and
11 D here where we've got these situations.

12 And I might comment that under this rule
13 you don't have to have violated a court order
14 to be sanctioned, and that was sort of what
15 the -- what I'm going to call the Tommy Jacks
16 group of the committee thought ought to
17 happen, but he's -- I think there has been a
18 slight shift in position on that. In fact,
19 they've changed their minds about that, is
20 what's really happened, or Tommy has.

21 It says that you ought not to have to
22 have -- necessarily have a violation of a
23 court order if one of these things occurs.
24 And one of them is that a party, a party's
25 attorney, or a a person under the control of a

1 party has either disregarded a rule, a
2 Discovery Control Plan, or subpoena repeatedly
3 or in bad faith -- and so you either have to
4 be able to show repeated violations or a bad
5 faith action; (B) has destroyed evidence in
6 bad faith or engaged in other conduct that an
7 order compelling, denying, or limiting
8 discovery cannot effectively remedy.

9 And if you will remember, we talked about
10 that specific area and that language two
11 meetings ago, if I'm not mistaken, either two
12 or three meetings ago of this Committee.

13 Or (C), has repeatedly made discovery
14 responses that are untimely, clearly
15 inadequate or made for purposes of delay or
16 discovery -- of delay, and there ought to be a
17 comma there -- or discovery requests or
18 objections to discovery that are not
19 reasonably justified. We talked about that
20 language, too. We've discussed, we being this
21 whole Committee, have debated and discussed
22 that language at length. And it was our sense
23 that that didn't mean that you were right
24 about it, but it meant that this language was
25 the best we could come up with. It just

1 wasn't even reasonably justified to make the
2 objections; and has otherwise -- or has
3 otherwise abused the discovery process.

4 And that word was debated in this large
5 Committee; that is, if you're just guilty of
6 abusing the process, if you do that, if you're
7 found to have done that, then, as it says in
8 (b) below, a court may impose any of the
9 following sanctions that are just under the
10 circumstances.

11 And that language, "just under the
12 circumstances," Alex, wasn't that where we
13 pulled our Transamerican? Isn't that our
14 shorthand version of the Transamerican?

15 PROFESSOR ALBRIGHT: No. I
16 think we had some other Transamerican
17 language.

18 MR. LATTING: I didn't think
19 so, but maybe so.

20 PROFESSOR ALBRIGHT: Well,
21 "just" as defined -- what Transamerican does
22 is define "just."

23 MR. HERRING: Well, it pulls it
24 out of the rule, is where it pulls it out of,
25 and then discusses it.

1 MR. LATTING: Okay. And then
2 we set them forth, so I don't think -- I can't
3 recall anything that's worth talking about in
4 that list, except I wonder, I just wonder out
5 loud that if we say in no. (8) "such orders as
6 are just," I wonder about why did we just stop
7 at seven? Why don't we put eight or 10 more
8 in there, but...

9 MS. SWEENEY: I'm sorry, I
10 don't understand what you mean.

11 MR. LATTING: Huh?

12 MS. SWEENEY: I don't
13 understand. What do you --

14 MR. LATTING: Well, I mean,
15 we've listed seven things that a court can
16 do. I don't know why we chose seven and then
17 say that they can do anything else that's
18 just. Why don't we just say that the court
19 can make such orders as are just. We've got
20 kind of a laundry list of things that can be
21 done, and it doesn't seem to me like we need
22 that, but I don't see any big issue about
23 putting it in.

24 And then we've also talked about the time
25 for compliance. We've debated that at length

1 here. And when I say we've debated it at
2 length, Luke, I'm not saying we can't talk
3 about it any more, I'm just reminding people
4 that these are things that we have had fairly
5 extensive debate on. In fact, all of them
6 we've had fairly extensive debate on.

7 We had before the comment, I believe,
8 didn't we, I know we talked about it, and I
9 think we had the comment that paragraph 5 on
10 "Review" does not change or address the
11 availability of mandamus relief in sanctions
12 proceedings. I know we talked about that in
13 this Committee.

14 And so it sounds almost too good to be
15 true, but I don't think that there's anything
16 in this rule that comes to my mind that we
17 haven't discussed at great length and that is
18 still the subject of substantial
19 disagreement. I move we pass it.

20 MR. LOW: I have one question.

21 CHAIRMAN SOULES: Okay. Any
22 discussion? Buddy Low.

23 MR. LOW: Well, that "[??"
24 Nature of Hearing and Evidence," what is
25 that? Is that supposed to be a section? What

1 does that mean?

2 MR. LATTING: Well, that's just
3 what Chuck Herring was mentioning, that Bill
4 is supposed to be addressing what kind of
5 hearings are required.

6 MR. LOW: Okay. So that's not
7 a part of what we're --

8 MR. LATTING: No, no. That's
9 just our little extra language.

10 CHAIRMAN SOULES: You can
11 strike that out. That's not being voted on.

12 MR. LATTING: That's not being
13 voted on at all.

14 MR. LOW: Okay.

15 MR. LATTING: John Marks.

16 CHAIRMAN SOULES: John Marks.

17 MR. MARKS: Okay. Under (ii)
18 in (a), 3, "Sanctions," subsection (D),
19 doesn't that just kind of open the door to
20 letting the court do what it wants to do,
21 "has otherwise abused the discovery process
22 in seeking, making or resisting discovery"?
23 Should that be in there? That's awfully
24 broad.

25 And also under (C), "or discovery

1 requests or objections to discovery that are
2 not reasonably justified."

3 MR. LATTING: Well --

4 MR. MARKS: I mean, should you
5 allow the court to make the rulings simply
6 like this without requiring, you know,
7 something more of an order or something like
8 that?

9 MR. LATTING: Well, we thought
10 so, because we thought that anything that
11 constituted abuse -- we didn't think that we
12 could write everything that might -- that
13 nasty, mean lawyers could think up to do; and
14 that we thought that we needed to have some --
15 and when I say "we," I'm talking about this
16 larger Committee. We thought we needed to
17 have something to cover situations that were
18 just abusive, and I guess --

19 MR. MARKS: Well, I understand
20 you're chastising me for not being here --

21 MR. LATTING: No, no, no. No,
22 I'm not at all.

23 MR. MARKS: -- when you all had
24 that discussion. But it seems to me that
25 that's awfully broad, and why shouldn't the

1 court look at that first before entering these
2 draconian sanctions against somebody? I mean,
3 I think (D) ought to be deleted from (ii) and
4 the second part of (c). And I make that in
5 the form of a motion.

6 CHAIRMAN SOULES: What is it
7 now you're -- in (ii) you want (D) deleted?

8 MR. MARKS: Under (ii), delete
9 under (C) after "delay" where it says "or
10 discovery requests or objections to discovery
11 that are not reasonably justified." And then
12 all of (D).

13 MR. LATTING: Well, I'm not
14 chastising you at all for not being around
15 earlier, but we've talked about this so long
16 that it's just the old thing over again, which
17 is where do we draw the line?

18 All I can say is that I think Jacks and
19 most of the people that I thought were of that
20 persuasion were happy with this language and
21 thought that it afforded enough protection to
22 keep the court from doing something too
23 arbitrary but still allowed enough leeway to
24 provide for those unforeseeable or at least
25 unforeseen situations that are truly abusive;

1 that to do something that's not even
2 reasonably justified, you know, gives -- and
3 we do have the Transamerican protection, and
4 then all of that put together ought to be a
5 reasonable balance of lawyers and courts, and
6 so that's the only thing I can say. I hope
7 that it doesn't come out, because I think
8 we'll be sorry if we pass the rule that way.

9 Rusty.

10 CHAIRMAN SOULES: Well, wait a
11 minute, there was a motion, I think, that we
12 have here.

13 But this rendition of 166d reflects the
14 votes of this Committee on prior occasions,
15 and we voted on virtually every word of it and
16 its organization. That doesn't mean that we
17 don't revisit it today, because we're here on
18 final consideration, so I don't want to make
19 short shrift of this, but it may move faster,
20 it may move slower, and that's what it does.

21 You're making a motion there, John, to
22 delete in (ii) at the top of the second page
23 in the one, two, three, four, five, sixth line
24 down, after the words "made for purposes of
25 delay," all of the rest of that paragraph

1 (ii)?

2 MR. MARKS: Yes.

3 CHAIRMAN SOULES: Is there a
4 second?

5 MS. GARDNER: I'll second that.

6 CHAIRMAN SOULES: What?

7 MR. LOW: No, I was just going
8 to raise a question.

9 CHAIRMAN SOULES: Is there a
10 second?

11 MS. GARDNER: Yes, I second it.

12 CHAIRMAN SOULES: Okay.

13 There's a second. Let's have discussion.

14 MR. LOW: Well, if you stop at
15 "made for purposes of delay," if you stop
16 there and you don't put "or discovery requests
17 or objections," there's nothing in there that
18 covers discovery requests at all. What else
19 covers discovery requests?

20 CHAIRMAN SOULES: Well, that's
21 why it's in there. That's why we voted to put
22 it in.

23 MR. LOW: Yeah. So why take it
24 out? Because otherwise it would just pertain
25 to not giving discovery requests, and

1 discovery requests can be abusive, so I don't
2 know why you would want to take that out,
3 unless I just don't understand.

4 MS. SWEENEY: I agree with
5 Buddy. I think it's important.

6 CHAIRMAN SOULES: Rusty
7 McMains.

8 MR. McMAINS: Well, I agree
9 with regards to having all of (C) intact,
10 because it would need to be on both sides,
11 whether you're asking for discovery or opposed
12 to discovery. On the other hand, I also agree
13 that (D) is an open-ended invitation to kind
14 of invent something. I can't think of a
15 single thing that doesn't fit that is
16 condemnable that doesn't either fit within the
17 parameters of the first parts or that should
18 be made the subject of an order that is
19 violated first.

20 The problem that I have is this a -- this
21 (ii) is an alternative to violating an order.
22 So if somebody is doing something repeatedly
23 that isn't specifically covered in any of
24 these things in (ii) that you want to deal
25 with, you can go get an order from the court,

1 and if they continue to do it, then you
2 automatically are into the sanctions area. I
3 don't understand what (D) does other than open
4 Pandora's box.

5 CHAIRMAN SOULES: Buddy Low.

6 MR. LOW: What if you have a
7 pretrial conference, they don't make certain
8 things and you have a pretrial conference, and
9 the judge says, "Okay. I want you to" --
10 something comes up about a lot of documents.
11 He says, "Okay. I'm ordering you to do" -- "I
12 want you to do this. I want you to do this
13 and do that." It's not -- you haven't made a
14 response or a request for anything. The judge
15 just ordered it under a pretrial conference
16 and you violate that. Where would that fit in
17 other than in that section?

18 MR. McMAINS: Whether you
19 violate an order of the court makes no
20 difference.

21 MR. LOW: I understand. But
22 where does it say a party -- an order of the
23 court?

24 MR. McMAINS: In (i), the first
25 one. See?

1 MR. LOW: Okay.

2 MR. McMAINS: The sanction says
3 that in addition to these orders up here, in
4 the Arabic numeral 3, "Sanctions," it says
5 initially there, it says that "if the court
6 finds that a person subject to a discovery
7 order, other than a Discovery Control Plan
8 under Rule 1, has failed to comply with the
9 order, or" -- so this is the "or."

10 Now, you have either violated a court
11 order or you fit into one of these categories
12 before you can move into this sanctions area.

13 And so the problem I have is, what is it
14 that -- and I realize their argument is
15 basically, as I understand Joe's argument, is
16 basically that, well, we can't even imagine
17 how bad lawyers can be. If you tell them
18 everything they can't do, they'll think of
19 something else.

20 MR. LATTING: Yeah, that's my
21 argument.

22 MR. McMAINS: And my position
23 on that is, yeah, that's fine. But if it is
24 abusive -- and your position is, well, if it's
25 abusive, we can smell it. We know what it

1 is. It's like obscenity; we know it when we
2 see it but we can't define it. You can damn
3 sure get an order prohibiting it, and once you
4 get an order prohibiting it and it continues,
5 then you go straight to sanctions, and you
6 don't have a problem.

7 But the idea that you are relieved of
8 getting an order and merely just come in and
9 say, "Well, they're doing this. It's an abuse
10 of the discovery process, and it just -- it is
11 because it just smells bad," and allowing the
12 judge to say, "Well, you know, I believe
13 that's right," because basically when you say
14 that, particularly in the language "has
15 otherwise abused," by definition it has to be
16 something other than any of these other
17 elements. It has to not be an obstruction of
18 evidence. It has to not be a repeatedly made
19 discovery response.

20 Okay. So what does it -- it has to fit
21 outside of those and still constitute a
22 discovery abuse, and basically it just has to
23 be determined to be a discovery abuse. I see
24 no useful function in having that additional
25 offense in there.

1 MS. SWEENEY: Well, we do know
2 of instances where --

3 CHAIRMAN SOULES: Paula
4 Sweeney.

5 MS. SWEENEY: -- lawyers
6 obstruct discovery. That's not listed here,
7 but I don't think you have to wait for them to
8 do it repeatedly.

9 MR. MARKS: Like where they
10 have struck each other?

11 MS. SWEENEY: Yes.

12 MR. MARKS: You mean like a
13 fist fight?

14 MS. SWEENEY: Uh-huh. I think
15 you may have been involved in some of those
16 instances.

17 MR. MARKS: Me, Paula?

18 MS. SWEENEY: Yes.

19 CHAIRMAN SOULES: Who else is
20 talking there? Okay. Paula, you have the
21 floor.

22 MS. SWEENEY: Yeah. You've had
23 situations where you're trying to take a
24 deposition and somebody is so obstructive and
25 obstreperous that the deposition ends because

1 they're screaming, because they're having
2 tantrums, because they're hauling witnesses
3 out in the hall, because they're
4 interrupting. You've had, you know, witnesses
5 or lawyers throwing things. I mean, there are
6 all kinds of things that happen. I don't
7 propose that we list in the rule "Don't throw
8 things. Don't hit people." But I also don't
9 think that you ought to let them hit people,
10 go to the court, get an order saying "don't
11 hit me again," but you can't get sanctions for
12 it. There are a lot of things that --

13 MR. MARKS: Well, don't get --

14 CHAIRMAN SOULES: John Marks,
15 you have not been recognized. Mr. Marks, you
16 have not been recognized.

17 MR. MARKS: I'm sorry.

18 CHAIRMAN SOULES: We need to
19 get ahold of this debate because we can't get
20 it on the record any other way.

21 MS. SWEENEY: So I think we
22 need the language. I agree with Buddy. We
23 need the catchall phrase (D), that they've
24 done something else that is bad that couldn't
25 be listed here that hasn't previously been

1 brought to the court's attention but that we
2 all know is a bad thing, and Judge, we want
3 relief.

4 CHAIRMAN SOULES: Steve
5 Yelenosky.

6 MR. YELENOSKY: If we're
7 concerned about attorneys hitting one another,
8 I assume that we're concerned if they do that
9 at a deposition or as they pass in the hallway
10 or on any occasion. And does the court need a
11 discovery sanction in order to deal with that
12 conduct? Is there some way in which, number
13 one, I mean, I hope that's very rare; but
14 number two, when that does happen, I would
15 assume there's some other way in which a judge
16 could deal with that without a discovery
17 sanction. If not, then maybe we need a rule
18 about attorneys hitting one another that isn't
19 confined to depositions. I think that --

20 CHAIRMAN SOULES: Richard
21 Orsinger, and then I'll get to Buddy Low.

22 MR. ORSINGER: My recollection
23 of how we got to where we are today is that
24 the Sanctions Task Force made a recommendation
25 that permitted the district judge to drop even

1 death penalty sanctions on the first
2 transgression. It was rejected by a majority
3 vote. The subcommittee, which Joe was
4 running, was instructed to come back with
5 something that had a procedural step in
6 between for some of these safeguards before
7 the ultimate sanctions are levied. And the
8 subcommittee report came back with slightly
9 different wording but exactly like the task
10 force. We debated that for another four or
11 five hours. We voted it down. The
12 subcommittee was sent back to come back with
13 another proposal, and they came back with a
14 proposal that was slightly different but not
15 any practically different of going directly to
16 sanctions on the basis of a motion without an
17 intervening court order that was later
18 violated.

19 Then finally Tommy Jacks volunteered to
20 draft some paperwork for those who voted in
21 the majority every time we took a vote on
22 this. And my recollection is that at least at
23 that time Tommy didn't come up with the
24 language.

25 Now I understand, and I have not

1 participated in your subcommittee, now I
2 understand that Tommy, as a representative of
3 those who voted against the direct-to-the-
4 death-penalty approach, has accepted this as
5 compromise language that eliminates his
6 concern about giving the district judge the
7 power to go all the way on the first motion.

8 Now --

9 MR. LATTING: Can I speak to
10 that?

11 MR. ORSINGER: Let me finish.
12 I didn't want to usurp the floor, and maybe
13 I'm wrong when I say that, but I think that's
14 what happened.

15 MR. LATTING: Let me just
16 reply, if I could. I think that that's pretty
17 much accurate with, I think, one extra step in
18 there. But what happened was that then we had
19 the passage of the Discovery Rules which
20 caused him and those with him on the
21 subcommittee to rethink their requirement for
22 an intervening court order because of the
23 times involved, because of what it was going
24 to do in throwing out of kilter the discovery
25 scheduling that was going on in what we just

1 passed at the last meeting of this.

2 MR. ORSINGER: Okay. Well, I
3 don't fully understand how those interrelate,
4 but I will say this, that I am comfortable
5 with the compromise that allows the court to
6 go directly to the death penalty sanction
7 without an intervening order on (A), (B) and
8 (C). But I think if (D) is in there, then
9 there's no reason in listing (A), (B) or (C),
10 because we have a situation where any time the
11 trial judge thinks the discovery process was
12 abused in any way even once he can go all the
13 way to the ultimate sanction, and the only
14 remedy is by a mandamus or appeal to say that
15 the trial court abused his discretion.

16 And I therefore feel like we are exactly
17 where we were on day one when the task force
18 recommendation was voted down and day two,
19 three and four when the subcommittee
20 recommendations were voted down as long as (D)
21 is in there.

22 MS. GARDNER: May I be
23 recognized, Mr. Chairman?

24 CHAIRMAN SOULES: Buddy Low is
25 next. Then I'll get to Anne Gardner.

1 MR. LOW: I don't think Paula
2 meant just the circumstance of hitting
3 people. I think she stated some other
4 things. I'm sitting here with my witness,
5 we're taking depositions, and that's part of
6 the discovery process, and ask him a question
7 and I start nodding. Well, I had -- and he'll
8 say "yes," and I do that (indicating). I
9 mean, that's an abuse, and you've gone to
10 New York to do that; or Rambo tactics, and I
11 realize maybe the depositions rules take care
12 of that. I don't know. But as I understand,
13 this is the only thing that deals with
14 sanctions and penalties for sanctions, and
15 certainly there would be an abuse that's not
16 listed here if somebody is nodding an answer
17 or interfering with the witness, won't let a
18 witness do this or that, even though the rules
19 say they should. And I think that's what
20 Paula was getting at, and for that reason I
21 think we need that in there. And lastly, if
22 there's just not anything else out there that
23 it could be, what's it going to hurt?

24 CHAIRMAN SOULES: Well, this --
25 I was just looking back here at May of 1994,

1 which is -- we've had spotty discussions of
2 sanctions since then, but that was the last
3 time that we had any -- I think any real
4 in-depth discussion of this. And this
5 provision is not in what we were discussing in
6 May of 1994, and it wasn't added at that time
7 either, so this is something that is a
8 change.

9 And I don't know whether -- one way to
10 fix it would be to say "has otherwise
11 repeatedly abused the discovery process." We
12 use those words in some places so that we have
13 some way to reach the undefined and maybe
14 imponderable violations at this point. That
15 may not work, though. I'm trying to come up
16 with some balance between not being able to
17 anticipate all of the violations that should
18 be sanctioned with a direct path from one
19 violation to ultimate sanctions, which we've
20 never -- this Committee has never been in
21 favor of the latter. And I don't know exactly
22 how to do that. Maybe that's what the issue
23 is.

24 Rusty.

25 MR. McMAINS: Well, once again,

1 we -- our Discovery Rules have in fact
2 addressed mode of conduct at depositions. The
3 actual number (B) or (A) here says "has
4 disregarded a rule, a Discovery Control Plan,
5 or subpoena repeatedly or in bad faith."

6 Now, coaching the witnesses in the course
7 of the deposition, harassing witnesses, all of
8 those things are prohibited under the rule.
9 All of those things fit within the definition
10 that allows them to impose sanctions now. But
11 you're given some notice because you know
12 what's in the rule.

13 Then this just says "has otherwise abused
14 the discovery process in either making or
15 resisting discovery," and that's it. And what
16 it means is somehow otherwise. Okay. Well,
17 we're going beyond conduct which is prohibited
18 by the rules. We're talking about something
19 otherwise. We're going beyond, since we're in
20 this second part, violating a court order, and
21 we're going beyond repeatedly making discovery
22 responses that are untimely, clearly
23 inadequate, doing all of these things that
24 relate to the discovery process. It's
25 something else.

1 remedy.

2 Second, I think that I agree with all the
3 criticisms of subsection (D); that the
4 paragraph (ii), it seems to me, should be for
5 the more egregious offenses and it opens the
6 door to these ultimate sanctions for all
7 offenses.

8 But I also -- when I originally seconded
9 John's motion to amend or for deleting the
10 second portion of (C), I felt and I still feel
11 that the latter -- the second portion of (C)
12 is subject to the same criticisms as (D),
13 because there's nothing egregious about
14 discovery requests or objections that are
15 simply not reasonably justified.

16 CHAIRMAN SOULES: Well, that's
17 modified by "repeatedly made."

18 MS. GARDNER: Well, if it is,
19 it's not clear that it is. If it could be
20 made clearer that that is the fact, then I
21 would be happy with that and would withdraw my
22 second.

23 CHAIRMAN SOULES: All right.
24 "Repeatedly made." We don't have any problem
25 with repeating that language. It may be

1 redundant. But if it's for clarity, that's
2 fine.

3 MS. GARDNER: It doesn't seem
4 that it modifies the whole -- both of those.

5 MR. YELENOSKY: Grammatically
6 it does, but it could be clearer.

7 CHAIRMAN SOULES: Okay. We'll
8 fix that then.

9 MS. GARDNER: Okay.

10 CHAIRMAN SOULES: Joe Latting.

11 MR. LATTING: The committee
12 would be happy also -- I mean, the
13 subcommittee would also be happy if we added
14 the "repeatedly made" language to (D), "or has
15 otherwise repeatedly abused the discovery
16 process," et cetera.

17 CHAIRMAN SOULES: Let me ask
18 you, Anne, you withdrew your second as to the
19 verbage, deleting the verbage in (C). Are you
20 also withdrawing your second on the deletion
21 of (D)?

22 MS. GARDNER: Oh, did he also
23 move to delete (D)?

24 CHAIRMAN SOULES: He did.

25 MS. GARDNER: No, I don't. I

1 still move to delete (D).

2 CHAIRMAN SOULES: Okay.

3 MR. ORSINGER: I'll second her
4 motion or John's or whoever it was.

5 CHAIRMAN SOULES: Okay. The
6 motion on the floor at this time is to delete
7 (D) from (ii). Is there any opposition to
8 that? The motion is to delete (D). Let's
9 take a straw poll, if not an official vote, at
10 least.

11 Let's see, those in favor of deleting (D)
12 show by hands.

13 MR. MARKS: Deleting (D)?

14 CHAIRMAN SOULES: Deleting (D).
15 Six. Those in favor of leaving it in. Well
16 it's a pretty close vote. Maybe we need to
17 talk about it.

18 MR. LOW: Just because the
19 death penalty is given or listed here doesn't
20 mean -- the Supreme Court has set some pretty
21 good guidelines about death penalties. Now, I
22 don't think it -- well, go ahead.

23 MR. LATTING: Let me speak to
24 that.

25 CHAIRMAN SOULES: Well, I think

1 you need to wait until the other people that
2 are talking are done, Joe, instead of jumping
3 in to the middle of everyone's comment.

4 Okay. Buddy, please give us your views.

5 MR. LOW: I don't think that
6 this implies that it's proper in every case
7 that -- you know, the judge has got to use
8 some discretion. I mean, you know, which one
9 of these is he going to apply to this and
10 which one to that, so these are the available
11 ones. And I don't just interpret that to mean
12 just a discovery abuse will do that. If it's
13 so bad, then maybe so, but you better watch
14 what the Court has written about the death
15 penalty. That's all I'm saying.

16 CHAIRMAN SOULES: Joe.

17 MR. LATTING: I apologize for
18 interrupting you. In direct connection with
19 that, this is a computer error. We had this
20 language -- we intended under "Sanctions"
21 where it says, "A court may impose any of the
22 following sanctions," it says, "that are just
23 under the circumstances."

24 The language that we had intended to put
25 in there, but didn't print it, is this: "A

